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2-5-08

No. 07-607

In the Supreme Court of the United States

AGUSTIN AGUAYO, PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in considering whether petitioner's stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated in determining whether the Department of the Army Conscientious Objector Review Board (Board) had a basis in fact for denying petitioner's conscientious objector application.

2. Whether the court of appeals erred in holding that the Board had a basis in fact for denying petitioner's conscientious objector application.

3. Whether the court of appeals erred in considering a supplemental memorandum filed by the Army in the district court further explaining its decision to deny petitioner's conscientious objector application.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 476 F.3d 971. The opinion of the district court (Pet. App. B1-B10) is reported at 445 F. Supp. 2d 29.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2007. A petition for rehearing was denied on June 7, 2007. On August 29, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 4, 2007, and the petition was filed on November 5, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is the policy of the United States military to grant conscientious objector status to current service members who have a "firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief." Department of Defense Instruction 1300.06 § 3.1 (May 5, 2007) (Instruction 1300.06) <http://www.dtic.mil/whs/directives/corres/ins1.html>; see also Army Reg. 600-43, Glossary Section II (Aug. 21, 2006) (defining "conscientious objection") <http://www.apd.army.mil/pdffiles/r600_43. pdf>.[1] A person who, by reason of conscientious objection, sincerely objects to military service in any form is known as a "Class 1-0 Conscientious Objector" and is discharged from service. Instruction 1300.06 § 3.1.1. However, "no member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a Conscientious Objector." *Id.* § 4.1.1.

The term "religious training and belief" is defined by regulation as a "[b]elief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being" and "may include solely moral or ethical beliefs" in addition to traditionally "religious" beliefs. Army Reg. 600-43, Glossary II; see Instruction 1300.06

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[1] Both petitioner and the court of appeals refer to 32 C.F.R. 75.1-75.11, where Department of Defense Instruction 1300.06 was formerly codified. Those provisions, however, were removed as duplicative in June 2007. See 72 Fed. Reg. 33,677 (2007). Accordingly, this brief refers only to the provisions in Instruction 1300.06 and Army Regulation 600-43 and not the removed provisions of the Code of Federal Regulations.

§ 3.2 (similar). In determining whether a conscientious objection is founded on "religious training and belief," the Army considers whether the asserted beliefs "are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them." Army Reg. 600-43, Glossary II.

In evaluating a conscientious objector application, the Army considers several factors, including:

> training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; [and] credibility of persons supporting the claim.

Army Reg. 600-43 ¶ 1-5*a*(5)(*b*).

A member of the Army seeking conscientious objector status must submit an application and exhaust an administrative review process. See Pet. App. A3-A5, A16; Army Regulation 600-43, ¶¶ 2-2 to 2-8. At the conclusion of the review process, the Department of the Army Conscientious Objector Review Board (Board) makes the Army's final determination on the application. *Id.* ¶¶ 2-8. If that determination is challenged in federal court, the reviewing court must uphold the Board's decision unless it has "no basis in fact." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

2. In 2002, petitioner voluntarily joined the Army, committing to eight years of service with four years of active duty. In February 2004, shortly before he was deployed to Iraq, petitioner applied for a conscientious

objector discharge. Pet. App. A2. In his application, petitioner explained: "My moral view does not allow me to take the life of another human being" and "[my] progressive training in arms and other military operations have progressively, and from the very beginning, caused me great anguish and guilt." *Id.* at A3.

Army officials undertook a review of petitioner's claim. An Army chaplain concluded that petitioner "seem[ed] to be sincere" but that "it [wa]s difficult to assess the depths of his beliefs because they rest solely with[in] his own thinking and personal values." Pet. App. A3. He also noted that "the timing of [petitioner's] request makes it questionable." *Ibid.* An investigating officer was appointed, and he held a hearing in Tikrit, Iraq, where petitioner and four witnesses testified. *Ibid.* Although the investigating officer recommended that petitioner's application be granted, four officers in petitioner's chain of command who reviewed the application recommended that it be denied. One officer concluded that petitioner's "pursuit of conscientious objector status [wa]s an attempt to remedy his anxiety all soldiers face during an extended deployment in a combat theater of operations." *Id.* at A4. Another officer noted he "d[id] not believe that [petitioner's] belief [wa]s consistent w[ith] conscientious objection." *Ibid.*

The Staff Judge Advocate reviewing petitioner's application also recommended that it be denied, explaining that petitioner "did not identify any specific ways he has altered his behavior to accommodate his beliefs" or any "significant source of his beliefs other than he was raised in a kind and respectful family." Pet. App. A4-A5. And he noted that "the timing of [petitioner's] application raises doubts as well." *Ibid.* At the conclusion of

the administrative review process, the Board issued a decision denying petitioner's application. *Id.* at A5.

3. Petitioner filed a habeas corpus petition in federal district court, seeking discharge from the Army as a conscientious objector. See 28 U.S.C. 2241 (2000 & Supp. V 2005); *Parisi* v. *Davidson*, 405 U.S. 34, 39 (1972). The parties agreed to stay proceedings to permit petitioner to submit additional evidence to the Board and for the Board to consider that evidence and review petitioner's entire application *de novo*. Pet. App. A5. Petitioner stated in his additional submission that his "convictions are strong and are deeply rooted based on [his] upbringing, morals, and the experiences [he] ha[s] had in the army." *Ibid.* The Board again denied petitioner's application. *Id.* at A6.

Petitioner then filed an amended habeas petition with the district court. The Army opposed the petition and filed a supplemental memorandum further elaborating the Board's basis for denying petitioner's application. The supplemental memorandum listed the following reasons for the Board's decision:

> Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs.
>
> Applicant has not provided any significant source of his beliefs; conscience or moral view that would warrant Conscientious Objector status.
>
> Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.

> Questionable timing of the application just prior to unit deployment.

Pet. App. A6-A7.

The district court denied the petition for a writ of habeas corpus. Pet. App. B1-B10. As a starting point, it noted that internal military personnel decisions "are afforded substantial deference"; a court reviewing a denial of conscientious objector status "does not weigh the evidence or test whether substantial evidence supports the military's position" but instead asks only whether the Board's decision "had some basis in fact." *Id.* at B4-B5.

The court then determined that the Board's decision had ample basis in fact. After surveying the record, it stated that petitioner "d[id] not identify any religious training or belief that would justify conscientious objector status," and his "beliefs do not appear to be grounded in religious principles or developed through activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated." Pet. App. B6. The court also noted that "the timing of [petitioner's] application is suspect" because petitioner submitted his application shortly after his unit was informed of a pending deployment to Iraq. *Id.* at B6-B7. And it concluded from the record that petitioner's beliefs arose prior to his enlistment, making him ineligible for conscientious objector status. *Id.* at B7.

The district court also rejected petitioner's argument that the Army failed to follow its own regulations, which require it to provide an applicant who is denied conscientious objector status with the reasons for its decision. Pet. App. B7-B10. The court reasoned that the Board's denials of petitioner's application, the minutes of the

Board's meeting at which the application was considered, and the Board's supplemental memorandum together satisfied that requirement. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A20. It first rejected petitioner's argument that district court erred in considering the Board's supplemental memorandum. *Id.* at A8-A11. The court acknowledged that judicial review of an administrative decision "is generally limited to the existing administrative record," but it found that the supplemental memorandum could be considered because, if the memorandum were excluded and the remaining record were found insufficient, the proper course would be to remand to the Army for an additional explanation, which is exactly what the supplemental memorandum provides. *Id.* at A8-A9. Further, the court held, the supplemental memorandum was properly considered under Habeas Corpus Rule 7 (28 U.S.C. 2254 rule 7), which provides that "the judge may direct the parties to expand the record by submitting additional materials relating to the petition." *Id.* at A9. Moreover, the court explained that the supplemental memorandum did not present new evidence; instead, it listed reasons for the Board's decision based on the evidence already in the record. *Id.* at A10. Finally, the court rejected petitioner's argument that the memorandum should be excluded because it did not comply with Army regulations. *Id.* at A10-A11.

On the merits, the court of appeals noted the "extremely narrow" standard of review, under which the court could reverse only if the Board's decision "ha[d] 'no basis in fact.'" Pet. App. A12 (quoting *Witmer* v. *United States*, 348 U.S. 375, 381 (1955)). The court then concluded that the Army had ample basis in fact for denying petitioner's application. *Id.* at A14. While "[n]o

single fact or statement is dispositive," the court of appeals found that "based on the entire record" the Board could conclude that petitioner did not meet his burden that he qualifies as a conscientious objector. *Id.* at A18. It pointed to the Board's conclusions that petitioner "lacked the 'religious foundation' or 'underpinning' required," that he "had not adequately explained the source of his claimed beliefs," that he "appeared to hold his beliefs prior to enlistment," and that "the timing of [petitioner's] application was suspect." *Id.* at A16.

Although petitioner asserted that his moral view does not allow him to take another life, the court noted that the Army "is entitled to require more than mere assertions of belief," and it concluded that here the record supports inferences that contradict petitioner's asserted beliefs. Pet. App. A17. For instance, Army officials who reviewed petitioner's application concluded that petitioner "did not identify any specific ways he has altered his behavior to accommodate his beliefs" and "expressed doubts as to the depth and source of [petitioner's] convictions." *Id.* at A18. In the court's view, petitioner's "own application materials" cast doubt on his claims, because they failed to show that his beliefs developed through "activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated," Army Reg. 600-43 ¶ 1-5*a*(5)(*b*), or that those asserted beliefs "[we]re the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them," Army Reg. 600-43, Glossary Section II. Pet. App. A18-A19. Moreover, the court stated that petitioner's explanation that his beliefs were premised on his religious upbringing suggested that they existed prior to his enlistment. *Ibid.* Finally, the

court noted that petitioner's application was made "just days before his deployment to Iraq," and while that suspicious timing could not by itself support denying the application, the Board could nonetheless consider that factor in reviewing petitioner's application. *Id.* at A19.

ARGUMENT

The courts below carefully considered and unanimously rejected petitioner's habeas petition challenging the Army's refusal to grant petitioner a conscientious objector discharge. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner's fact-bound contentions are without merit and do not warrant further review in this Court. Accordingly, the petition should be denied.

1. Petitioner first contends (Pet. 16-21) that the court of appeals erred in considering whether his stated beliefs were developed through an activity comparable in rigor and dedication to the process by which traditional religious convictions are formulated. That contention is without merit, and does not implicate any disagreement in the circuits warranting review.

a. First, petitioner is mistaken in asserting (Pet. 17-18) that the court of appeals looked only to whether petitioner developed his stated beliefs through "study or contemplation" in upholding the Board's decision. As the court of appeals expressly noted, Army regulations provide "a list of factors to be considered" in determining whether an applicant has met his burden of establishing eligibility for conscientious objector status. Pet. App. A15. The court of appeals found that the Board's decision had a "basis in fact" not just because the development of petitioner's stated beliefs lacked rigor and

dedication, but also because of the suspect timing of petitioner's application; because his conscientious objection appeared to have existed at the time of his enlistment; and because his asserted beliefs were not "the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them." *Id.* at A18-A19 (quoting Army Reg. 600-43, Glossary II).

Although petitioner contends that the challenged factor "alone cannot be a reason to deny his application," Pet. 20, and that the court of appeals "turned [it] into a *sine qua non*," Pet. 18, the court below was in fact careful to observe that "[n]o single fact or statement is dispositive," and it reached its conclusion "based on the entire record" and not on one factor alone, Pet. App. A18. Indeed, petitioner concedes that under the Army's regulation, this factor is "simply one of a half dozen" relevant factors to consider, Pet. 17, and that is precisely how the Board and the court of appeals treated the matter. Thus, even if the challenged factor were stricken, the Board's decision would be supported by the other remaining, valid factors considered by the Board.

b. Petitioner also contends (Pet. 16) that the court of appeals' reliance on the factor regarding how he developed his stated beliefs violates the Establishment Clause and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.* Petitioner did not press this argument below,[2] it was not passed on by the

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[2] A single sentence in a footnote of petitioner's opening brief refers to RFRA and the Free Exercise Clause (but not the Establishment Clause) in support of a different argument (that the Army's regulation recognizing that moral or ethical beliefs, not just religious beliefs, can be the basis for a conscientious objection). See Pet. C.A. Br. 37 n.15. And even with respect to that different argument, petitioner conceded

court of appeals, and thus it is not properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari only when the question presented was not * * * passed upon below.") (internal quotation marks omitted). For that reason alone, the Court should decline to consider petitioner's claim.

In any event, petitioner's argument lacks merit. The challenged regulation does not create a "preference [for] one form of religion over another," Pet. 17. The Army's regulation addresses only whether the applicant's stated beliefs were developed by the kind of "rigor and dedication" that would lead the Board to conclude that the applicant's stated beliefs are sincerely held. That factor simply tests the sincerity of an applicant's stated beliefs; it does not prefer one religion or set of beliefs over another, nor does it prefer religion over non-religion. Indeed, the Army's regulation does not require the applicant's conscientious objection to be based on religion at all. See Army Reg. 600-43, Glossary II ("The term 'religious training and belief' may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not religious.").

Petitioner is likewise mistaken in contending (Pet. 17) that the court of appeals required that he develop his beliefs in a "particular manner." Both the court of appeals (Pet. App. A18) and the Army (see Army Reg. 600-43 ¶ 1-5*a*(5)(*b*)) acknowledged that an applicant's stated beliefs may be developed in any number of ways,

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there was no First Amendment or RFRA violation. *Ibid.* Petitioner's reply brief, moreover, expressly disclaimed any RFRA argument. See Pet. C.A. Reply Br. 8 n.4.

as "through training, study, contemplation, *or other activity* comparable in rigor and dedication." Army Reg. 600-43 ¶ 1-5*a*(5)(*b*) (emphasis added).

c. Contrary to petitioner's contention (Pet. 18), there is no disagreement among the circuits regarding the weight to be given to the process by which an applicant for conscientious objector status developed his beliefs. None of the cases petitioner cites considers whether reliance on this factor violates the Establishment Clause or RFRA. Instead, each decision simply represents an application of the Army's regulations to the facts of a particular applicant's case. And the decision below has none of the deficiencies that other courts have identified with Board decisions denying conscientious objector status. For example, in *Lobis* v. *Secretary of the Air Force*, 519 F.2d 304, 307 (1st Cir. 1975), the Board erred in relying exclusively on an applicant's suspicious timing to deny his application. In this case, by contrast, the court of appeals permissibly viewed timing as just one of many factors supporting the Board's conclusion. Pet. App. A18-A19 (noting that "suspect timing of a CO application is not, in itself, sufficient grounds for its denial").

United States v. *Burton*, 472 F.2d 757, 760 (8th Cir. 1973), *United States* v. *Timmins*, 464 F.2d 385, 387-388 (9th Cir. 1972), and *United States* v. *Stetter*, 445 F.2d 472, 479 (5th Cir. 1971), are also inapt. In those cases, applications were erroneously denied on the basis that the applicant lacked formal or traditional religious training. Here, the Board did not deny petitioner's application because he lacked a particular type of training (religious or otherwise), but because the activities he claimed had led to his beliefs lacked rigor and dedication, and

numerous other factors also undermined his application. Pet. App. A18-A19.[3]

Nor is this case anything like *Kemp* v. *Bradley*, 457 F.2d 627, 629-630 (8th Cir. 1972), where the Board applied the wrong standard in assessing a conscientious objector application and failed to make any factual findings that would have been relevant under the correct standard. See also *Peckat* v. *Lutz*, 451 F.2d 366, 368-370 (4th Cir. 1971) (the Board failed to give any reasons at all for denying the application). In this case, there was ample evidence in the record—including petitioner's "own application materials"—that "provide[d] reason to doubt" petitioner's statements that he qualifies for conscientious objector status. Pet. App. A18-A19.

2. Petitioner contends (Pet. 21-24) that the court of appeals acted "contrary to binding authority" in finding that the Board's decision had a basis in fact. That is incorrect. Contrary to petitioner's contention (Pet. 21-22), the decision below is consistent with this Court's decision in *Witmer* v. *United States*, 348 U.S. 375 (1955). *Witmer* held that a Board's decision to deny conscientious objector status can be overturned only if it has "no basis in fact." *Id.* at 381 (quoting *Estep* v. *United States*, 327 U.S. 114, 122 (1946)). The Court explained that the lower courts should not "sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies."

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[3] In *Hanna* v. *Secretary of the Army*, No. 07-1090, 2008 WL 82233 (1st Cir. Jan. 9, 2008), the court of appeals expressly distinguished this case on its facts, finding it "inapposite" because petitioner "had failed to identify the source of his non-religious objection to war" and "had failed to show that his ethical objection to war had developed through activity comparable in rigor to the processes by which religious convictions are formed." *Id.* at *11.

Id. at 380-381. The court of appeals cited and applied that standard in this case, and it concluded based on "the entire record" that the Board's decision had a basis in fact. Pet. App. A12-A19.

The court of appeals did not err in finding a basis in fact to uphold the denial of petitioner's application. See Pet. 23 (asserting that the Army lacked "concrete evidence to doubt [petitioner's] sincerity"). As explained above, the record evidence amply supports the Board's decision. That evidence suggested to the Board and the court of appeals that the development of petitioner's stated beliefs lacked rigor and dedication; that his conscientious objection appeared to have existed at the time of his enlistment; that his asserted beliefs were not the product of a conscious thought process resulting in a conviction allowing him no choice but to act in accordance with them; and that the timing of his application was suspicious. Pet. App. A6-A7, A18-A19. The court of appeals thus properly "examine[d] the objective facts * * * to see whether they cast doubt on the sincerity of his claim." *Witmer*, 348 U.S. at 382.

Petitioner points to a single sentence in the decision below, which stated that "the Army is entitled to require more than mere assertion of belief." Pet. 21 (quoting Pet. App. A16-A17). Petitioner argues that that statement permits the Army to reject his application because of a bare, unsupported disbelief of his stated convictions. But read in context the sentence simply recognizes that the Army was not required to grant an application simply because an applicant professes certain beliefs, but may test those stated beliefs against the objective record evidence, in line with the factors set forth in the Army's regulations. See Pet. App. A18-A19. That is precisely what the Board and the court of appeals did in

this case, and it is fully consistent with this Court's decision in *Witmer*.[4]

3. Finally, petitioner argues (Pet. 24-25) that the court of appeals erred in considering the supplemental memorandum the Board filed in the district court. Petitioner raises no conflict in the circuits, and this Court thus should decline to consider his case-specific claim.

In any event, the court of appeals did not err in considering the supplemental memorandum. As the court explained, consideration of the memorandum was proper under Habeas Corpus Rule 7 (28 U.S.C. 2254 rule 7), and the memorandum did not contain any new evidence not already in the administrative record. See Pet. App. A9-A10. Petitioner offers no response to these points. Instead, he raises unsubstantiated and meritless claims of "manipulation and abuse" and of violation of his due process rights. Pet. 24. The record reflects that petitioner's application received considerable attention from a number of Army personnel, even though they (like petitioner) were stationed in the midst of the conflict in Iraq. Pet. App. A3-A6. After petitioner filed suit, the Board reconsidered his application *de novo*. *Id.* at A6. In light of the Army's careful consideration of his application, as well as the two layers of judicial review petitioner received, he cannot credibly claim a violation of due process. In light of petitioner's failure to take issue with the court of appeals' reasoning, as well as the absence of any authority to support his claim or any conflict with the decision of this Court or a court of appeals,

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[4] Contrary to petitioner's suggestion (Pet. 22), the decision below is also consistent with *De Walt* v. *Commanding Officer*, 476 F.2d 440 (5th Cir. 1973) (per curiam). The *DeWalt* Court upheld the denial of a conscientious objector application where objective evidence supported the Board's decision. *Id.* at 442. That is precisely what happened here.

petitioner's case-specific claim does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2008